3rd March 2023

Review of Australia's Autonomous Sanctions Framework
Australian Sanctions office
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
BARTON, ACT, 0221

Via email: sanctionsconsultation@dfat.gov.au

Dear Sir/Madam,

Australian Custodial Services Association Submission on the Review of Australia's Autonomous Sanctions Framework

The Australian Custodial Services Association (**ACSA**) is the peak industry body representing members of Australia's custodial and investment administration sector. Our mission is to promote efficiency and international best practice for members, our clients, and the market. Members of ACSA include NAB Asset Servicing, J.P. Morgan, HSBC, State Street, BNP Paribas Securities Services, Citi, Clearstream and The Northern Trust Company.

Collectively, the members of ACSA hold securities and investments in excess of AUD $4.0 trillion in value in custody and under administration for Australian clients comprising institutional investors such as the trustees of major industry, retail and corporate superannuation fund, life insurance companies and responsible entities and trustees of wholesale and retail investment funds. Those institutional investors are responsible for a sizable proportion of the money invested and held for Australian retail investors. ACSA member services are therefore integral to supporting the investment and retirement savings of a large part of the Australian population.

ACSA feedback on Australia's Autonomous Sanctions Framework is attached and focuses on the following areas:

- ACSA members recent experience in navigating the framework in relation to the Russian Sanctions.

- ACSA members experience as branches and subsidiaries of global banking and financial services organisations in navigating both Australian frameworks and sanction frameworks from their home locations such as the US and Europe.

- ACSA member experience in helping clients, superannuation fund and regulated managed investment schemes, navigate the framework, and support the protection of fund members and investors interests and Australia's foreign policy.

Thank you again for the opportunity to participate in this consultation. Please contact me if you have any comments about this submission.

Yours sincerely

David Travers
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About ACSA

www.acsa.com.au

Custodians provide a range of institutional services, with clients typically favouring a bundled approach to custody and investment administration. Solutions may include traditional custody and safekeeping, investment administration, foreign exchange, securities lending, tax and financial reporting, investment analytics (risk, compliance and performance reporting), investment operations middle office outsourcing and ancillary banking services.

These services represent key investment back-office functions – often representing the client's asset book of record and essential source data in relation to the investments they hold.

The key sectors supported by ACSA members include large superannuation funds and investment managers, as well as other domestic and international institutions.

ACSA works with peer associations, regulators, and other market participants on a pre-competitive basis to encourage standards, promote consistency, market reform and operating efficiency.

Note: The views expressed in this letter are prepared by ACSA for the purposes of consideration by The Department of Foreign Affairs and Trade and should not be relied upon for any other purpose. The comments in this letter do not comprise financial, legal or taxation advice and should not be regarded as the views of any particular member of ACSA.

ACSA feedback on Russian Sanctions

Issue 1: Streamlining legal framework

A. How could the Autonomous Sanctions Framework be made more clear and easy to navigate?

ACSA members are in favour of simplification and greater user-friendliness within the Autonomous Sanctions framework. ACSA members find the framework challenging when determining whether certain activities are sanctions under broadly worded regulations. This can result in the regulations having seemingly unintended consequences or creating a costly, or time-consuming path to determining the correct application of the regulations.

Further ACSA members, find the FAQs published by the US Office of Foreign Asset Control (OFAC) and the European Union Common Foreign and Security Policy (CFSP) to be useful in helping navigation of their respective legislative frameworks relating to sanctions and would support the issue of FAQs by ASO to support industry in navigating the current and any future legislative framework.

B. What challenges have you experienced in navigating the Autonomous Sanctions Framework? How could these be addressed?

ACSA members have noted that the framework is overly complex due to the number or regulations and instruments that need to be considered for different sanction related matters. For example, the assessment of the impact of Reg 13A.

ACSA members feel that ASO should consider models like the New Zealand Russia Sanctions Regulation 2022 which is a simpler yet effective approach.

As noted above, ACSA members believe the issue of FAQs (including industry-specific FAQs for financial services) could help those experiencing challenges navigating the existing and any future framework.

C. How would reducing the number of pieces of legislation that apply sanctions measures better assist you? Could this help with managing your administrative burden?

ACSA members support the simplification of the legislation applying to sanctions to reduce the cost and time taken to navigate the sanction framework when considering matters relating to the legislation.

Issue 2: Scope of sanction measures

A. Are the sanctions measures under the Autonomous Sanctions Framework fit-for-purpose? Are there other sanctions measures that would support Australia's foreign policy objectives?

As noted, ACSA members have had multiple challenges determining whether activities, relating to the institutional investment of superannuation funds and managed investment schemes, are sanctioned under the broadly worded regulations.

Some of the practical implications of applying the sanction measures for superannuation funds and managed investment schemes holding sanctioned assets are attached in Attachment A and include:

- The ability of entities to support Australia' foreign policy needs in reducing exposures to publicly traded sanctioned assets (eg, listed shares, bonds etc)
- The impacts of sanctioned assets on the valuation of superannuation fund and managed investment scheme portfolios
- Ongoing challenges in the activity of superannuation funds and managed investment schemes that continue to hold sanctioned assets
- The impacts of the sanctions in demonstrating adequate safekeeping of sanctioned assets in line with ASIC Regulatory Guide 146
- The impact of the sanctions on other government objectives such as the improvement of Superannuation outcomes for members through mergers and fund succession activities.
- The impacts of Australian sanctions on global transactions such as through Global Depositary receipts that operate under foreign government policy settings, such as the US which may not be consistent with the Australian sanctions framework.

As noted, ACSA members feel that ASO should consider models like the New Zealand Russia Sanctions Regulation 2022 which is a simpler approach. For example, ACSA members feel that the prohibition on the acquisition of securities of a sanctioned person in the New Zealand regulations is a narrower but effective measure that is comparatively clearer than regs 5B, 13A, 14 and 15 and has less potential for unintended results.

B. Have the below terms, or any other terms, in the Autonomous Sanctions Framework presented you with any challenges in understanding whether an activity you wish to undertake is sanctioned? For example:

- ***Directly or indirectly***
- ***Assets; and***
- ***Controlled asset.***

Aside from the terms 'directly or indirectly' and 'controlled assets' which ACSA members agree are challenging due to the broadly worded regulation. ACSA members consider that the 'indirect' element increases the risk of inadvertent contravention, especially where it is difficult to obtain reliable information in English to rule out the 'indirect' nexus or otherwise impractical to ascertain the indirect results of an activity. As noted above, the New Zealand concept of 'securities of a sanctioned person' is a clear alternative to the concept of 'controlled asset' and limiting the dealing prohibition to the acquisition of such assets is a practical and, from a policy perspective, effective measure.

ACSA members are also challenged by the definitions of 'dealing', 'using', 'allowing to use or deal', 'facilitating the use or dealing' and 'holding', as well as the application of the sanctions to securities, derivatives and cash (including income on securities). It would be useful to have guidance on what might not constitute a 'dealing' or 'use', and on what is meant by 'allowing' a use or dealing. Further, the ancillary liability regime should be sufficient to deal with the 'facilitation' element, without the need for that additional source of risk. It would also help create an exception to reg 15 for investments that have an ownership or control nexus with designated persons or entities where the investment was made before the designation or before the nexus was satisfied (for example, permitting divestment or continuing to hold the investment).

ACSA members would welcome additional guidance/ further legislative clarification to the Autonomous Sanctions Regulations 2011 in respect of the concept of "ownership and control" which is pivotal for determining whether an asset falls within the remit of the Reg. 15 prohibition ('Prohibition of dealing with controlled assets').

As an example, several jurisdictions specify a default threshold to aid with the determination of ownership and control, such as the UK, NZ, EU or the US. In the US, for example, OFAC's '50 Percent Rule' states that the property and interests in property of entities directly or indirectly owned 50 percent or more in the aggregate by one or more blocked persons are considered blocked. In UK and EU, an entity falls under the respective sanction regimes when over 50% of it is owned, directly or indirectly, by a person listed by one of their jurisdictions any entity "controlled" by a person on their respective lists, so such entities can be subject to the prohibitions even if the sanctioned party's ownership interest does not exceed 50%. NZ on the other hand, the prescribed threshold is a holding of 50% or more, or a right to exercise or control more than 50% of the governing body or voting power.

ACSA members would welcome guidance around this concept, especially give the experience of applications made under Reg. 23.

ACSA members would also welcome guidance in respect of cash dividends paid via the Russian central bank's settlement system (currently, a designated entity), or via a non-designated Russian Financial Institution or via the foreign subsidiary of a non-Russian bank. In particular insight in regard to whether the designated issuer paying the dividends is still seen as retaining some ownership or control over the dividend, and thus potentially triggering the prohibition in Reg. 15. Alternatively, clear guidance or a defined threshold for the concept of "ownership and control".

ACSA members would also like to seek further clarification around securities traded on secondary markets, and, whether such securities would fall under the remit of Reg. 15. Such securities, although originally issued by a now designated entity, can be legally and beneficially held by a non-designated person. For example, the EU takes the view that securities traded on a secondary market cannot be considered as "belonging to, owned, held or controlled by" the designated entity, nor can their purchase be considered as making funds or economic resources available to that entity.

ACSA members further highlight the potential for disagreement with their clients on what is the correct interpretation of the regulations in a particular scenario and the complexity of assessing the risk for primary and secondary liability under the current regulations. The absence of regulatory guidance, and the breadth of the concepts and prohibitions contribute to this potential.

C. Would having a uniform concept of sanctioned commercial activity assist you in understanding sanctions obligations for this measure? If not, what might?

ACSA members consider that a uniform and simplified concept would assist. For example, ACSA members find that the simpler concepts in the New Zealand legislation present significantly less challenges.

Issue 3: Permit powers

A. Are there situations which you think would warrant a standing general permit being issued? If so, what is the justification?

ACSA members view the "national interest" condition is quite restrictive and seek the ASO to issue exemptions similar to those issued by OFAC (special and general licences) and EU regulators to deal with unintended consequences, without placing the general public in the position of having to argue "national interest" considerations.

ACSA members would also welcome a general custody exemption similar in effect to s8(4) of the *Security of Critical Infrastructure Act 2018*.

B. Are there other permit-related matters you wish to raise?

ACSA members noted that the timeframe to obtain a permit / indicative assessment is too long and all permits and guidance (e.g. letters to industry, such as ABA) should be readily accessible by the general public, for transparency and to assist with interpretation and assessment of prospects of obtaining a permit.

Issue 4. Humanitarian exemption

A. In what circumstance would you support the introduction of a humanitarian exemption for a set group humanitarian actors?

ACSA members are generally in favour of a broad humanitarian exemption.

B. What safeguards would be necessary to ensure such an exemption is not misused, for example to facilitate proliferation financing or sanctions evasion?

ACSA members have no comment.

C. If an exemption for 'humanitarian assistance' were to be included in the legislation, what types of activities would it be important to capture?

ACSA members have no comment.

Issue 5: Sanction offences and enforcement

A. Would civil penalties be a suitable enforcement tool in the sanctions context?

ACSA members are generally supportive of civil penalties as an enforcement tool, however, have concerns that ACSA members maybe caught unintentionally under civil penalties due to the role that ACSA members play in the safekeeping of assets in a bare trustee capacity.

Issue 6: Review mechanism for designations and declarations

A. What risks or benefits do you see in replacing relisting mechanism with a requirement that every five years the ASO undertakes a public notification process that would provide listees with the opportunity to make submissions that the Minister would be required to consider?

ACSA members have no comment.

Issue 7: Regulatory functions of ASO

A. Do you support aligning the existing injunction power with those set out in Part 7 of the Regulatory Powers (Standard Provisions) Act 2014?

ACSA members have no comment.

B. How could changes to the Autonomous Sanctions Framework better assist you in applying for an indicative assessment or a permit through Pax, the Australian Sanctions Portal?

ACSA members have no comment.

C. What costs, financial or otherwise, that are outside of ordinary business-as-usual costs, have you incurred in complying with Australian autonomous sanctions (in particular, in seeking an indicative assessment or permit through Pax)? How many times a year do you seek an indicative assessment or permit?

ACSA members note costs arise from the complexity of determining how to comply because the regulations are open to interpretation and there is minimal guidance. The engagement of external counsel has been a significant cost to ACSA members in interpreting the complexity of the legislation and other sanction instruments.

D. Do you have any suggestions for reducing the costs associated with compliance with autonomous sanctions laws?

ACSA members have no comment.

E. What is your experience navigating the DFAT Consolidated List?

ACSA members have found that the search functionality of the Consolidated List is not reliable.

Attachment A

Practical implications of sanctions

Item	Description	Consideration
1. Sanction announcements	On 3 March 2022, The Minister for Superannuation, Financial Services and the Digital Economy and Minister for Women's Economic Security announced an expectation that Australian Superannuation Funds review their investment portfolios with a view to divest. From the 8 March 2022, The Minister for Foreign Affairs and Minister for Women, announced various sanctions on Russian and Belarusian individual and Banks. The short time between the initial advice to Superannuation Funds and the sanctions being implemented lead to many situations where Superannuation Funds where unable to divest the sanctions where introduced. This has resulted in several Superannuation Funds retaining holdings in Russian assets.	ASO should consider allowing time for regulated superannuation funds and managed investment scheme's managing portfolios, holding publicly traded securities (eg listed shares, bonds, cash) to divest of assets in a timely and efficient manner to achieve Australia's foreign policy objectives. For example, if the instruments giving effect to the Russian sanctions had allowed for a 30 or 60 day period for regulated funds to sell down their positions in an efficient manner then there would be less Russian investments remaining in these regulated funds. This gives greater impetus to the Australian foreign policy objectives and regulated funds would no longer maintain sanctioned positions in their portfolios.
2. Security sales (including cash repatriation and corporate actions)	Superannuation Funds are unable to transact either directly in the Russian market, or through a European or US stock broker, due to local or global sanctions, to sell Russian assets.	ASO should consider allowing time for regulated superannuation funds and managed investment scheme's managing portfolios, holding publicly traded securities (eg listed shares, bonds, cash) to divest of assets in a timely and efficient manner to achieve Australia's foreign policy objectives. This gives greater impetus to the Australian foreign policy objectives and regulated funds would no longer maintain sanctioned positions in their portfolios .
3. Income (including cash repatriation)	Superannuation funds that retain holdings of Russian assets are receiving dividends on some Russian assets and are unable to convert the income received into Australian dollars.	ASO should consider allowing time for regulated superannuation funds and managed investment scheme's managing portfolios, to repatriate sanctioned cash in a timely and efficient manner to achieve Australia's foreign policy objectives. This gives greater impetus to the Australian foreign policy objectives and regulated funds would no longer maintain sanctioned cash in their portfolios.
4. Safekeeping (including cash)	Superannuation fund assets are held in safekeeping by a global custodian who enables the holdings in Russia	ACSA seeks clarification and exemption on the obligations imposed by RG133 in relation to the safekeeping of any

	through a contracted Sub-custodian. RG133 requires a custodian to have appropriate processes and procedures in place to safeguard the assets of a client. Under the sanction arrangements, a custodian may be unable to ensure it can meet its obligations in RG133 for the safe keeping of assets.	sanctioned assets due to challenges in ensuring adequacy of safekeeping arrangements.
5. Currency holdings	At the time the sanctions where announced, many Superannuation funds had Russian Ruppel balances, or received Russian Ruppels for the sale of Russian Assets. Some assets may have also paid Dividends. Several Superannuation Funds retain Russian Ruppel balances.	ASO should consider allowing time for regulated superannuation funds and managed investment scheme's managing portfolios, to repatriate sanctioned cash in a timely and efficient manner to achieve Australia's foreign policy objectives. This gives greater impetus to the Australian foreign policy objectives and regulated funds would no longer maintain sanctioned cash in their portfolios.
6. Valuation of assets	Where a Superannuation fund remains the holder of a Russian Asset, the lack of a true market and ability to convert sales proceeds to Australian Dollars, has created inconsistent approaches to the valuation any securities held. This includes Russian securities being valued at Nil, cost, last traded price or a calculated price.	ACSA notes that in EU markets regulators have given effect to rules that valuation and segregation of sanctioned assets in portfolios. ACSA seeks consideration of similar rules being applied in Australia for sanctioned assets if they cannot be di vested. See ESMA announcement: https://www.esma.europa.eu/sites/default/files/library/esma34-45-1633_public_statement_on_impact_of_war_in_ukraine_on_investment_funds.pdf
7. Cross jurisdictional differences in approach to sanctions	All custodians with licenses in Australia have adopted processes and procedures to comply with Australian sanctions and sanction lists. ACSA members are generally large global banks or service companies, that also have obligations to their home countries, generally either US domiciled or EU domiciled. The have been instances where the inconsistencies between Australian, US and EU sanction policies and sanction	ACSA seeks consideration for sanctions relating to financial market activities to be harmonised globally to reduce the impact of sanctions for Australian regulated superannuation fund s and managed investment schemes to their global peers. This will ensure Australia remains a competitive market and continues to attract global financial services businesses.

	lists have created additional burdens on Australian Superannuation funds. This includes; where Australia has a sanction but the others do not; where a jurisdiction sanctions the Securities Depository but others do not.	
8. Superannuation Fund mergers	As you aware, APRA and the government has been encouraging the merger of Superannuation Funds to ensure superannuation members can benefit from scale and efficiencies benefits of merged funds. The sanctions have created an unexpected outcome whereby the mergers cannot be concluded due to any Russian assets held by the merging fund being unable to be transferred to the successor fund.	ACSA notes that in EU markets regulators have given effect to rules that valuation and segregation of sanctioned assets in portfolios. ACSA seeks consideration of similar rules being applied in Australia for sanctioned assets if they cannot be di vested. Or other arrangements to enable fund mergers to be finalised albeit sanctioned asset remain for transfer. See ESMA announcement: https://www.esma.europa.eu/sites/default/files/library/esma34-45-1633_public_statement_on_impact_of_war_in_ukraine_on_investment_funds.pdf
9. ADR/GDR conversions	As part of the Russian American Depository Receipts (ADR)/Global Depository Receipts (GDR) forced conversion processing under Federal Law No.319, which expired on 10 November 2022, the end ADR/GDR holders were permitted to approach the local Russian custodian banks holding the ordinary share equivalent of the ADR/GDR position, and present documentation to obtain ownership of the ordinary shares. If the application documents presented directly to the custodian for a depositary bank appeared in order, the custodian was mandated to release the ordinary shares. The ordinary shares would be released without the Depository bank's approval and without the ADR/GDR equivalent shares being removed from the end-investor's account. As a result, clients should be aware that it is possible that ACSA members ADR/GDRs	Consideration should be given to investors impacted by Russian ADR/DGR conversions being excluded from sanction rules relating to dealing activities and be exempted from penalties given the consequential impacts of the ADR/GDR conversion activities and the potential time needed to unwind the conversion outcomes.

	holdings may be temporarily overstated in their client's custody accounts.	